SUPREME COURT OF THE UNITED STATES.

No. 164.

THE UNITED STATES, APPELLANTS,

vs.

WILLIAM A. MULLOY.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	2	1
Final judgment by the court	3	2
Application by defendants for appeal	4	2
Order allowing same	4	2
Findings of fact by the court	5	2
Opinion of the court	6	3
Certificate		3

1 *Petition.—Filed Feb.* 20, '73.—*J. R.*

In the U. S. Court of Claims.

W'M A. MULLOY
vs.
THE UNITED STATES. } 6873.

The petition of W. A. Mulloy respectfully represents to this honorable court:

That he is a citizen of the United States, and that he has always borne true allegiance to the Government of the same; that therefore, to wit, on the 1st day of July, 1866, he was crier of the supreme court of the District of Columbia, and as such received for the year, from July 1, 1866, to July 1, 1867, the sum of $1,122, as pay for the discharge of the duties of said position, and also became entitled to the sum of $224.40 under the joint resolution of Congress of February 28th, 1867, allowing twenty per cent. extra compensation to persons in the civil service of the United States. Proof of the appointment of petitioner, and certificate of the First Comptroller of the Treasury of the amount received by him as compensation during the year, from July 1, 1866, to July 1, 1867, are filed herewith and asked to be taken as part hereof.

That the Interior Department is the Executive Department having jurisdiction of said claim, and that the petitioner made application to said Department for the payment of his said extra compensation, which was refused.

That the said claim has never been assigned, nor has any part thereof, nor any interest therein.

The petitioner prays for judgment against the United States for $224.40, in accordance with the act of Congress above referred to.

W. A. MULLOY.

RIDDLE & MILLER,
Attorneys for Claimant.

COUNTY OF WASHINGTON,
District of Columbia, ss:

The above-named W. A. Mulloy, being duly sworn, says that the statements set forth in the above petition are true; that no transfer or assignment of said claim, or of any interest therein, has been made; that he believes he is justly entitled to the amount claimed in said petition, and that no credits or offsets exist against the same.

W. A. MULLOY.

Subscribed and sworn to before me this 7' day of February, 1873.
[SEAL.]
R. J. MEIGS, *Clerk.*
By R. J. MEIGS, *Ass't Clk.*

2 In the Court of Claims of the United States.—December term, A. D. 1872.

W'M A. MULLOY
vs.
THE UNITED STATES. } No. 6873.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not con-

fessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of two hundred & twenty-four dollars & forty cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

JOHN GOFORTH,
Assistant Attorney-General.

Filed April 10, 1873.

3 In the Court of Claims.

WILLIAM A. MULLOY
vs.
THE UNITED STATES. } 6873.

At a Court of Claims held at the Capitol, in the city of Washington, the 17th day of May, A. D. 1875, judgment was ordered to be entered up, as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said William A. Mulloy, claimant, have and recover of and from the United States the sum of two hundred and twenty-four dollars and forty cents.

By the court.

4 In the Court of Claims of the United States.—Dec. term, 1874.

WILLIAM A. MULLOY
vs.
THE UNITED STATES. } No. 6873.

From the judgment rendered in the above-entitled cause, on May 17th, 1875, in favor of claimant, the defendants, by their Attorney-General, on the 8th of July, 1875, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Ass't Att'y-General.

Filed July 8, 1875.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

5 United States Court of Claims.

WILLIAM A. MULLOY
vs.
THE UNITED STATES.

The court finds the following facts:

1. Until the 2d February, 1867, the claimant was a crier appointed by the supreme court of the District. On the 3d February, 1867, he became

a bailiff to the criminal court, and continued such until the 23d February, 1867. From that time until the 4th March, 1867, he held no appointment and received no pay, at which date he was again appointed crier to the supreme court.

2. The claimant received for his services while on duty for one year, from the 30th of June, 1866, to the 1st of July, 1867, $1,122, but has been paid no additional compensation under the joint resolution of February 28, 1867. (14 Stat. at Large, 569.)

6 *Opinion by the court.*

RETURN J. MEIGS *vs.* THE UNITED STATES.
ZACHARY TAYLOR *vs.* THE SAME.
HILLARY GRIMES *vs.* THE SAME.
WILLIAM A. MULLOY *vs.* THE SAME.

NOTT, J., delivered the opinion of the court:

The court remains of the opinion expressed in Huntington's case, (8 C. Cls. Rps., 495,) that the twenty per cent. resolution refers to clerks and employés in the executive branch of the Government, and does not extend to those of the judiciary. But as this decision extends to a class of persons whose counsel believes that they possess a legal right of action, but who have not the right, by reason of the smallness of the demand, to carry up the question, we render judgment pro forma for the purposes of an appeal in certain of them, in the belief that the Attorney-General will not be averse to carry the question to the Supreme Court in this manner.

The judgment of the court is that the claimant R. J. Meigs recover $400; the claimant Taylor, $67.80; the claimant Grimes, $90; the claimant Mulloy, $224.40.

7 In the Court of Claims.

WILLIAM A. MULLOY
vs.
THE UNITED STATES. } No. 6873.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the Attorney-General for the allowance of an appeal as filed in the clerk's office July 8, A. D 1875, and of the order of the chief-justice of said court allowing the same, of the findings of fact by the court, and of the opinion of the court

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this seventh day of September, 1875.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 164. The United States, appellants, vs. William A. Mulloy. Court of Claims. Filed 6th October, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 161. UNITED STATES, APPELLANT, *v.* RETURN J. MEIGS, JR.

No. 162. UNITED STATES, APPELLANT, *v.* ZACHARY TAYLOR.

No. 163. UNITED STATES, APPELLANT, *v.* HILLARY GRIMES.

No. 164. UNITED STATES, APPELLANT, *v.* WM. A. MULLOY.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The question is whether or not these claimants, Mr. Meigs, as assistant clerk of the supreme court of the District of Columbia; Mr. Taylor and Mr. Grimes, as messengers of that court, and Mr. Mulloy, as its crier, were each entitled to 20 per cent. extra compensation, under the Congressional joint resolution of February 28, 1867, No. 30, (14 Stats., 569.) So much of this resolution as applies to these cases reads as follows: "There

shall be allowed and paid out of any money in the Treasury, not otherwise appropriated, to the following-described persons, now employed in the civil service of the United States, at Washington, as follows: To civil officers, temporary and all other clerks, messengers, and watchmen, including enlisted men detailed as such, to be computed upon the gross amount of the compensation received by them, and employés, male and female, in the Executive Mansion, and in any of the following-named departments, or any bureau or division thereof, to wit, State, Treasury, War, Navy, Interior, Post-Office, Attorney-General, Agricultural, and including civil officers, and temporary and all other clerks and employés, male and female, in the offices of the Coast Survey, Naval Observatory, navy-yard, arsenal, Paymaster-General, including the division of refeired claims, commissary-general of prisoners, Bureau of Refugees, Freedmen, and Abandoned Lands, Quartermasters, Capitol and Treasury Extension, city post-office, and Commissioner of Public Buildings, to the photographer and assistant photographer of the Treasury Department, to the superintendent of meters, and to lamp-lighters under the Commissioner of Public Buildings, an additional compensation of twenty per centum on their respective salaries as fixed by law, or, where no salary is fixed by law, upon their pay respectively, for one year, from and after the thirtieth day of June, eighteen hundred and sixty-six; but when any of said persons is, or shall be, only entitled to receive salary or pay for a part of said year, the said twenty per centum shall be computed on the amount such person is so entitled to receive for services in any or all of said departments or offices within said year: *Provided*, That the above-named ad-

ditional compensation to the employés of the Patent Office shall be paid out of the funds of said office: *Provided further*, That this resolution shall not apply to persons whose salaries, as fixed by law, exceed three thousand five hundred dollars per annum." (14 Stats., 569.)

ASSIGNMENT OF ERRORS.

The appellants assign for error, first, the judgments and decrees of the Court of Claims in these four cases in favor of the claimants and against the United States, (Record, p. 2, folio 3;) and say, secondly, that such judgments and decrees are not only erroneous in law upon the facts found, but that (without examining the facts) they should be reversed because it is made to appear in the case that they were rendered in order to allow the cases to come to this court by appeal, contrary to law and the intention of Congress. (Record, p. 3, folio 6.)

BRIEF.

Counsel having proposed to submit these causes upon brief, it was thought best to follow their example and argue all four in one brief, although there are circumstances which may distinguish one from the other. For instance, the Court of Claims finds that Mr. Taylor, appellant in No. 162, "was appointed by the marshal of the District of Columbia a messenger for the criminal court of the District, at a per diem compensation while on duty. By reason of the adjournment of the court from some day in February, 1867, previous to the 28th of that month to some day in the following March, he was not on duty and was not paid on that day." (Record in No. 162, pp. 2, 3.) A similar finding was made in Mr.

Mulloy's case, No. 164. (Record, 3, top.) Neither of these two claimants, therefore, was on the 28th day of February, 1867, when the resolve upon which they rely was approved, within its *descriptio personarum*, because not "*now* employed in the civil service of the United States at Washington." The hiring and payment was day by day, and there was no office independently of the daily performance of prescribed duties; the statute expressly declaring "the compensation to be given only for actual attendance." (10 Stats., 165, middle.)

But none of the four claimants are entitled to recover, because neither of them come within the true intent of the resolution, or have proved facts sufficient to bring them within its terms.

Mr. Meigs, claimant in No. 161, "*was appointed by the clerk of the supreme court of the District of Columbia an assistant clerk, at a salary of* $2,000 *a year.* The clerk was appointed by the court." (Record, p. 2, bottom.) At the time of the passage of this resolution there was no such office known to the law as an *assistant* clerk of this court. The act of March 3, 1863, c. 91, reorganizing the courts of this District, by its second section, provided "that the said court shall have power to appoint a clerk, who shall take the oath and give a bond, with sureties, in the manner prescribed by law for clerks of district courts of the United States." (12 Stats., 763, § 2.) Of course he could hire such help as he needed and chose to employ, in copying or other work, but these persons would be his employés, payable out of his own pocket, in the first instance; the existence of the necessity, and the propriety of the payment and of its amount being determined, upon audit, by the accounting-officers of the Treasury, or the Secretary of the Interior, on ap-

peal. Act of June 25, 1864, c. 163, § 1, (13 Stats., 196, top.)

Suppose the clerk hired an unnecessary man, because he wished to be away, or to be idle, or agreed to pay, and did pay, an unreasonable compensation, that would not prevent the party employed from recovering of the clerk just the sum for which it was agreed the services should be rendered; but the clerk himself would have to lose it, if (because of his own improper conduct) the bill was cut down by the accounting-officers or the Secretary. The clerk-hire is paid out of the fees that accrue to the clerk by virtue of his office, (13 Stats., 196, top,) and the criers and bailiffs are paid by the marshal from governmental funds in his hands. (10 Stats., 165, middle.) All the accounting-officers do is to take care that the surplus belonging to the United States is not unfairly and unreasonably diminished by the unauthorized retention of too large a sum for the payment of these subordinates.

The citation which claimants make in their brief, pp. 2 and 3, from Manning's case, (13 Wall., 578,) does not sustain these claims. The assistant clerk is hired and paid by the clerk out of the office fees; he is not known to any department officer. The clerk hires so many as he pleases, and agrees upon the rate of compensation. The crier and attendants are appointed by the court, (10 Stats., 165, middle,) and are paid by the marshal their statutory pay; they are not known to any department officer, nor is their number or compensation fixed by any such official; so these appointees hold by a different tenure from what Manning did, as to those very particulars by reason whereof judgment was given in his favor. (13 Wall., 578, bottom.)

As was said, per Clifford, J., in Fitzpatrick's case, (13 Wall., 573, bottom,) "the terms of the enactment are special and do not extend to every employment in that service, but only to the described persons and classes of persons therein mentioned."

Those persons and classes included the employés of the various *executive* departments, the bureaus and divisions thereof, in Washington. It did not profess to include *judicial* officers in its very careful and comprehensive enumeration. *Expressio unius*, &c. The wardens and guards at the jails are functionaries whose duty it is to aid in the execution of the law. They belong to the executive department. The clerk and other officers appointed by the court, though they do not act judicially themselves, belong to the judicial department, since the sole object of their creation—the *raison d'être*—is that the judges may be able properly to conduct and preserve the record of their proceedings and perform their peculiar functions. The fact that the crier and the attendants are paid out of the funds in the hands of the marshal no more makes them executive officers than it makes the witnesses and jurors so, these being paid in the same way. All these are part of the machinery necessary to make up a judicial determination. The marshal himself, *not* appointed by the court, is present to be ready to execute this determination in any given case when it is reached.

At the conclusion of their brief, (page 4, top,) counsel say, "The object of that resolution was to increase the pay of the employés in the civil service of the government within the District of Columbia to enable them to meet the increased expenses thrown upon them by the

then existing condition of things here. Are not these claimants in the civil service? Are they not in as great need of this bounty of Congress as any of the other employés of the government? Is there anything in the fact that they are connected with our courts in the administration of the laws of the land that should disqualify them from receiving the benefits of this law?"

If there are no harder questions than these to answer, the task is easy. Though these claimants are in the civil service, they are not within any of the classes of persons designated in the resolution, which does "*not* extend to every employment in that service." (13 Wall., 573, bottom.)

To the next inquiry the reply is, that these claimants did *not* come within the mischief the resolution was intended to remedy. They were "*not* in as great need of this bounty of Congress as any of the other employés of the government," because, as to Mr. Meigs, his pay was regulated by such agreement for adequate compensation as he might see fit to make with the clerk, there being no statutory regulation of, or limitation upon, the amount; and as to the others Congress had within that same week, by act approved February 22, 1867, c. 67, (14 Stats., 408, middle,) given them pay retrospectively from January 1, 1866, at the rate of $3.50 a day, in lieu of two dollars. It can hardly be supposed that another spasm of generosity would seize Congress so soon, so that the pay of these men should be retrospectively more than doubled within a week, which would be the case if they obtain twenty per cent. upon their previously increased compensation. "Is there anything in the fact that they are connected with our courts in the

administration of the laws of the land," that should entitle them to such speedily cumulated benefactions? The only effect that the fact of a connection with the court has to "disqualify them from receiving the benefits of this law" is because Congress chose to make the holding of a position in the *executive* departments and bureaus mentioned, by persons employed in this one city, a limitation upon, or condition of, the recipiency of its bounty, and properly made this restriction, so far as these claimants are concerned, because it had a very few days before provided very liberally for them. These two acts are to be considered as explaining each other, and showing by what apt language Congress increased the pay of the court employés when it desired so to do.

II.

We deem it proper to ask the attention of the court to a brief consideration of the second ground of error alleged by us, viz, that the judgments should be reversed because rendered *pro forma* against the defendants in cases where the court thought, upon the law and the facts, they should properly be given in favor of the government, and that this was done with the avowed purpose of evading the act of Congress regulating appeals, and indirectly to give to the claimants the benefit of an appeal where Congress had denied the right.

This is distinctly stated in the opinion, which we copy entire:

"The court remains of the opinion expressed in Huntington's Case, (8 C. Cl's R'p's, 495,) that the twenty per cent. resolution refers to clerks and employés in the executive branch of the government, and does not extend

to those of the judiciary. But as this decision extends to a class of persons whose counsel believes that they possess a legal right of action, but who have not the right, by reason of the smallness of the demand, to carry up the question, we render judgment *pro forma* for the purposes of an appeal in certain of them, in the belief that the Attorney-General will not be averse to carry the question to the Supreme Court in this manner.

"The judgment of the court is that the claimant R. J. Meigs recover $400; the claimant Taylor, $67.80; the claimant Grimes, $90; the claimant Mulloy, $224.40." (Record, p. 3, folio 6.)

The present is thought to be as favorable an opportunity to call in question the legal propriety of this course as any likely soon to arise; because an expression of the disposition of the Attorney-General toward this method of procedure is invited by the opinion, and it is also believed that the judgments must be reversed upon the ground of error first assigned, and one be entered in accordance with the ruling of the court below in Huntington's case, while at the same time advantage can be taken of the occasion to express the views of this court upon the subject. I desire to discuss the legal bearings of the action taken by the Court of Claims, without being considered as reflecting upon that tribunal, or having any other thought or care than that the correctness or legal irregularity of its procedure may be authoritatively declared; but the nature of the undertaking may make my arguments assume more the appearance of adverse criticism than is usual or generally desirable, or than would now be indulged had I more skill to choose a phraseology that should at the same time express my respect for the Court of Claims, and my sincere convic-

tion that the course pursued by it in these cases ought not to be sustained or approved.

The Court of Claims is one of those courts, inferior to the Supreme Court, which Congress could constitutionally ordain and establish. United States *v.* Klein, (13 Wall., 145, top,) where it is added, "Undoubtedly the legislature has complete control over the organization and existence of that court, and may confer or withhold the right of appeal from its decisions."

Congress, freely exercising this power to permit or deny appeals as to district, territorial, and circuit courts, has thus bestowed and limited the right of appeal from the Court of Claims, in Revised Statutes, section 707: "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from *all* judgments of the Court of Claims, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine." The legislative will as to what causes might, and what might not, be appealed under this section is unambiguously expressed; and this court has said that, where such is the case, it ought to be respected by the judiciary. "Judicial power," says Chief Justice Marshall, "as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised *in discerning the course prescribed by law; and when it is discerned, it is the duty of the court to follow it.* Judicial power is never exercised for the purpose of giving effect to the will of the judge; ALWAYS *for the purpose of giving effect to the*

will of the legislature; or, in other words, the will of the law." Osborn *v.* United States Bank, (9 Wheat., 866.) "What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed. A thing within the *intention* of the makers of the statute is as much within the statute as if it were within the letter." United States *v.* Babbitt, (1 Black, 61, citing several cases,) and the foregoing language from United States *v.* Freeman, (3 Howd., 565.) But it were worse than idle to multiply citations to the effect that the legislative intent should govern—that it is the law. There can be no doubt that Congress intended by this statute that no person against whom the Court of Claims found the law and the facts should have any appeal unless his demand exceeded $3,000. There can be no question that the course pursued by the Court of Claims, in cases like the present, not only has the effect to defeat and nullify the legislative intent, but that it is adopted for that very purpose. If this were a single instance, it would not have caused animadversion, but it is not so; it is the settled and declared policy of the court to defeat the will of the legislature.

Compare with the foregoing quotation from Marshall, C. J., the language of the Court of Claims in another Osborn case, (9 Ct. of Cls., 155, middle:) "There is a certain hardship in the claimant's case, because he had no right of appeal which would have enabled him to review the judgment of this court; but *he could have requested the court to decide one case of the class against the government*, which had the right of appeal, and to suspend judgment in the other cases," &c., &c.

The only sanctity which the judgments of this (the Supreme) Court possesses is such as they derive from

the Constitution—"that pure fountain from which the jurisdiction of all the Federal courts is derived," Am. Ins. Co. *v.* Canter (1 Pet., 545)—and the laws made in pursuance thereof. No man is entitled to your judgment, unless that right be given by law. United States *v.* Nourse, (6 Pet., 495, middle;) Durosseau *v.* United States, (6 Cr., 314;) Wiscart *v.* Dauchy, (3 Dallas, 327;) Barry *v.* Mercein, (5 How., 119, bottom;) United States *v.* Curry, (6 *Id.*, 113, bottom;) Forsyth *v.* United States, (9 How., 572;) *Ex p.* Vallandigham, (1 Wall., 251;) *Ex p.* McCardle, (7 Wall., 513.) Within their spheres of final jurisdiction, the inferior Federal courts possess like powers, derived from the same source, with the highest; and their ultimate decrees have the same sanction.

It is, therefore, not properly to be considered a hardship that a party has no appeal from the adverse judgment of whatever tribunal the law has made final arbiter of his dispute. In a case in a circuit court involving less than $5,000, it is no more a hardship that the losing party must abide the event than it is in a cause where a larger sum is in dispute that the winner there cannot retain his judgment, but is liable to have it reversed here. It is this unfounded notion of hardship that wrecks the law. Winterbottom *v.* Wright, (10 Mees. and Wels., 116.) The willingness and effort of the Court of Claims to have its decisions reviewed by this court is appreciated, as evincing an earnest desire to be right and to afford the fullest opportunity for the attainment of a just and satisfactory determination of every litigated question. The spring of action, the moral motive, is commendable. The complaint is that, in the present instance, it has led to the adoption of a course which is *legally* erroneous, and for many other reasons not to be

commended. The best intentions often lead to acts which purity of purpose cannot justify. If, upon examination of the facts and consideration of the law, the Court of Claims became of the opinion that the claimants were not entitled to recover, they were bound conscientiously so to apply the law to the facts and render judgment accordingly, instead of imposing this duty upon the Supreme Court. To come to one conclusion upon the law and the evidence, and then to announce a contrary judgment, with the avowed object of casting the burden of an appeal upon shoulders where it did not belong, is legally indefensible, and the error becomes even more apparent if this course is adopted solely to evade a statutory provision and to defeat its whole intent.

It must tend to weaken the popular regard for law, for the court to indicate a way to evade its requirements, and to set the example of colorable evasion. A verdict would hardly be sustained if the jury, in the same breath, declared it did not represent their understanding of the law as given them by the court, nor their own understanding of the facts given in evidence. It would hardly be thought a legally correct practice in a circuit court for a judge in a jury-waived case to set the damages at $6,000, if satisfied from the law and evidence that they were actually but $5,000, in order that an appeal might be taken; or in a State court, where the accused can except and the prosecutor cannot, to rule against the prisoner, on a point where law and fact were believed to favor him, simply because he could appeal and the government could not. It is true there are frequent occasions when the right of appeal will exist in whichever way a mooted point is determined; and the judge often in

such cases rules upon a disputed proposition, *pro forma*, to indicate that the question is doubtful, and that he intends it to be understood that he will be free, even in the inclination of his mind, to rule the other way when the cause is again presented for his consideration in the appellate court; but this is very different from ruling contrary to an expressed and decided opinion upon the law and facts; and so ruling in order to give an appeal where it would not otherwise exist.

Upon this very subject, of an appeal made to depend upon the amount in dispute, this court said, per Marshall, C. J., over sixty years ago, "The *spirit* as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus, a writ of error lies to the judgment of a circuit court where the matter in controversy exceeds the value of $2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter is of less value, and implies negative words. This restriction, however, being implied by the court, and that implication being founded on *the manifest intent* of the legislature, can be made only where that manifest intent appears. *It ought not to be made for the purpose of defeating the manifest intent of the legislature.*" Durosseau *v.* United States, (6 Cr., 314–15.)

"A particular mode is provided by which an appeal from the decision of the district judge may be taken; consequently, it can be taken in no other way. No provision is made for an appeal by the government; of course none was intended to be given it." United States *v.* Nourse, (6 Peters, 495, middle.) We do not think it would ever have occurred to Judge McLean, who gave this opinion, that he could indirectly give this right, while holding the circuit court, by deciding in favor of the adverse party, contrary to his own convictions; nor to Taney, C. J., who said, "It is said that this objection is a mere technicality, and may be regarded as a matter of form rather than substance. *But this court does not feel authorized to treat the directions of an act of Congress as it might treat a technical difficulty*, growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the courts by acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them. If the mode prescribed for removing cases by writ of error or appeal be too strict and technical, and likely to produce inconvenience or injustice, *it is for Congress to provide a remedy* by altering the existing law, *not for the court.*" United States *v.* Curry, (6 Howd., 113, bottom;) Sheldon *v.* Sill, (8 Howd., 449, top.)

This court, as now constituted, said, ten years ago, through Miller, J., with reference to appeals from the Court of Claims, "that taking an appeal is a matter of right, and is something which the party, *as distinguished from the court*, may do. When the court has rendered its

judgment 'either party may appeal.' That is, has *the right* to appeal, and may exercise that right by *his own volition.* The court cannot prevent it, NOR IS THE RIGHT DEPENDENT UPON ANY JUDICIAL DISCRETION." United States *v.* Adams, (6 Wallace, 107, which see.) If this is a right which the court cannot take away, it is one which no exercise of judicial discretion can properly confer. Indeed, exercising discretion to confer the privilege upon one to whom it does not properly belong, is, in effect, depriving his adversary of the right which belongs to him—the right to a final and conclusive determination, according to the law and the evidence. Legislation, State and national, has frequently allowed or required one of the parties to appeal, but it has never been left to the discretion of an inferior tribunal to say to one suitor "You may appeal," and to another "You shall not appeal." or have the benefit of an appeal

Where a division of opinion was certified *pro forma* this court refused to consider the question a Constitutional one. United States *v.* Stone, (14 Peters, 525;) United States *v.* Chicago, (7 Howard, 192;) Webster *v.* Cooper, (10 Howard, 54;) *ex parte* Gordan, (1 Black, 503, 505.)

"The discretion of a judge is said to be the law of tyrants; it is always unknown; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable." Therefore, so important a right as that of appeal has always been regulated by statute. Optima lex quæ minimum relinquit arbitrio judicis; *optimus judex qui minimum sibi.* The legislature can exercise discretion on this subject, and Congress has done so in permitting an appeal in cer-

tain cases to the government, while denying the right to the claimant. This discrimination is founded on the wisest reason; for the United States might lose a million dollars by the application of an erroneous legal principle to a thousand cases, involving but $1,000 each; while if the principle erroneously applied were favorable to the government, each suitor would thereby lose no more than if his adversary had been a private citizen.

The cases at bar are instances of this. The claimant Taylor (No. 162) recovers $67.80, and Mr. Grimes, (in No. 163,) $90. Every day justices of the peace in this city are deciding causes of greater pecuniary amount, that are not thought worth appealing, whether the decision be right or wrong; and beyond the supreme court of the District no appeal would be possible for these sums. Every day, almost, some citizen has decided in some circuit court of the Union a case involving nearly or quite $5,000; and to that decision, whatever it may be, he must submit. For a hundred years, nearly, men have been deprived of liberty, and of property by heavy fines, upon some ruling of a district or circuit judge, from which there was no appeal. This has remained so because it has been perceived that, in its practical operation, the system worked no injustice.

Why should the United States be compelled, by a judgment which did not meet the approbation of those who uttered it—and which, consequently, "goes forth without authority and comes back without respect"—to incur the trouble and expense of bringing up or presenting cases smaller in amount than are daily disposed of by justices of the peace? For the deliberate judgment of the Court of Claims, and the sincere convictions of the upright and experienced gentlemen who compose

it I should have great regard; but I am sure I shall be pardoned for speaking disparagingly of a judgment which they themselves think erroneous. Even if it were possible for this court to sustain the judgment of the Court of Claims, instead of concurring in its opinion, I should still confidently maintain my proposition that, under the circumstances, the government never ought to have been driven to bring up such a judgment here for affirmance or reversal; because, if the Court of Claims found the law and fact against the claimants, the adverse judgment of that court was all to which the plaintiffs were legally entitled.

Instead of being any greater hardship than is endured frequently by those compelled to acquiesce in a justice's judgment for $100, it is much less of one, because these claims are not for money due under previous contract, or for injuries sustained, but are attempts to obtain the benefits of a gratuity, bestowed by retroactive legislation, for those for whom a liberal provision had been made by just such legislation, within the week preceding the approval of this resolution. That equity did not require the allowance of this claim any more than law, was a sufficient reason for the government's resistance and appeal; especially (as has been before noticed) when a judgment based upon a particular construction of the statute, though giving but a very small sum to each individual plaintiff, might require a very large one to be disbursed from the Federal Treasury. Had a judgment against the claimants been rendered below, in conformity with that court's opinion of the requirements of a correct construction of the statute, the claimants (as before remarked) could not be said to have suffered any injury which the court had any right to avert by a

decision contrary to its views of the law and the evidence. If they make a mistake and "go wrong upon the evidence, it is the misfortune of the parties. *The object of the law is to give them a final power over the merits of the light class of litigation which it confides to them,*" to be absolutely determined, so far as the claimant can act. Birdsall *v.* Phillips, (17 Wend., 468, top.) "If this will give him no adequate redress of any grievance which he may have sustained, it is the fault of the law and not of the court." Gibbs *v.* Co. Commrs., (19 Pick., 299.)

A much graver consideration than the trouble and trifling expense incurred by the government, in bringing up and presenting these causes, is the labor and time improperly required from this court, by the unauthorized transfer to it of a responsibility which should have been fully discharged by another tribunal. Your docket is annually becoming more and more incumbered, with the yearly increase of population, wealth, and business, and the extension of the jurisdiction you are practically called upon to exercise by the enactment of the bankrupt act and other statutes, until at the current term over a thousand cases are awaiting your consideration.

In view of this condition of things, and to relieve you, circuit judges have been appointed, and more recently the least amount of damages which will authorize private litigants to demand your attention has been raised to $5,000. Is it right, then, that the Court of Claims should announce to claimants, as it practically did in Osborn's case, before cited from 9 Ct. of Cl., that it will, on request, render *pro forma* judgments against the government, in order that your judgment may be obtained; and, as was done here, that you should be called upon to

say whether or not Mr. Taylor shall have $67.80 and Mr. Grimes $90.

Counsel may reply that it would be competent to the Court of Claims, simply by leaving off the words "*pro forma*," to require your reviewal of a case in which their opinions were really in favor of the defense. While such a course is obviously one physically capable of adoption, we should never suggest that, legally or morally, it can be thought possible. It is a moral impossibility. We would not cast such a reflection upon any tribunal as to intimate that, coming to one conclusion upon the law and the facts, conformably to which it is officially bound (by the most solemn obligations and responsibility) to decide, it could possibly announce the contrary as its deliberate and recorded judgment, giving no intimation that any special reasons influenced it to such action. We will not admit any such proposition into our minds or our discussion.

It is true that the only intimation that the transcript contains, to show these judgments were not accordant with the conviction of the court, is found in the opinion of the court, which has been frequently declared no part of the record; but these declarations have been made where the opinion has been resorted to only to show the legal propositions maintained by the court below, and not as evidence of jurisdiction colorably conferred upon this court. Where this court found a *pro forma* judgment had been obtained solely to obtain its opinion as to a certain point upon which the interests of the nominal parties to the suit were not adverse but identical, it refused to give any and dismissed the bill. Lord *v.* Veazie, (8 Howard, 251.) So, where there was a color-

able assignment. Smith *v.* Kernochen, (7 Howard, 198.) In the present cases, the defendant below had a real interest, and were really aggrieved by the judgment rendered in the court below, from which it appeals; it is only as to that court that the judgment is *pro forma*, and by it so given because of its desire to obtain your views of a matter over which, in the light which the law and facts presented it to them, they should have exercised full and final jurisdiction.

In subsequent cases on the docket of this term, U. S. *vs.* Murray, No. 795, and others of like character, hereafter to be presented, having no equity, to extenuate a straining of the law, the judgments profess on the faces of the record to be rendered *pro forma;* showing the settled practice of the Court of Claims in this particular. In how many scores and hundreds of instances such a course has been heretofore adopted, without its being noticed by court or counsel, we can only conjecture.

EDWIN B. SMITH,
Assistant Attorney-General.

Supreme Court of the United States.

UNITED STATES, Appellants, *vs.* RETURN J. MEIGS, Jr.	No. 161.
UNITED STATES, Appellants, *vs.* ZACHARY TAYLOR.	No. 162.
UNITED STATES, Appellants, *vs.* HILLARY GRIMES.	No. 163.
UNITED STATES, Appellants, *vs.* WILLIAM A. MULLOY.	No. 164.

APPEALS FROM THE COURT OF CLAIMS.

A. G. RIDDLE,
FRANCIS MILLER,
Solicitors for Claimants.

Judd & Detweiler, Printers

Supreme Court of the United States.

UNITED STATES, Appellants, *vs.* RETURN J. MEIGS, Jr.	No. 161.
UNITED STATES, Appellants, *vs.* ZACHARY TAYLOR.	No. 162.
UNITED STATES, Appellants, *vs.* HILLARY GRIMES.	No. 163.
UNITED STATES, Appellants, *vs.* WILLIAM A. MULLOY.	No. 164.

APPEALS FROM THE COURT OF CLAIMS.

Statement of the Cases.

1st. R. J. Meigs, Jr., was, during the year covered by the joint resolution an assistant to the clerk of the supreme court of the District of Columbia, and was appointed by the clerk, who was himself appointed by the court.

2d and 3d. Taylor and Grimes were messengers, appointed by the United States marshal of the District of Columbia, at a per diem compensation.

4th. Mulloy was, during a portion of the year, crier of the supreme court of the District, appointed by the court,

and during the remainder, was a bailiff of said court, appointed by the marshal.

Points.

The construction of the joint resolution of February 28th, 1867, has twice before received the full consideration of this court in "The twenty per cent. cases," 13 Wallace, 568, and 20 Wallace, 179, and no lengthened argument can now be necessary.

By the act of February 26, 1853, § 3, (10 Stat. at L., 165,) the clerk and marshal are required to make returns of their receipts and expenditures to the Secretary of the Interior. And by the act of June 27, 1864, (13 Stat. at L., 196,) these accounts are to "be audited and allowed by the accounting officers of the Treasury, subject to an appeal to the Secretary of the Interior." The pay of the bailiffs and criers is fixed by the act of February 22d, 1867, (14 Stat. at L., 408.) The compensation of all these claimants was, therefore, under the supervision and control of the Secretary of the Interior, except when fixed by law, and in legal effect they all were paid by him.

In the case of Manning, (who was a guard at the jail, appointed by the warden,) 13 Wall., 578, the court says:

"Objection is made in this case, as in those previously decided, that the claimant does not show that he was an employé in any one of the departments, or in any bureau or division thereof, or in any office named in the joint resolution. His appointment, it is said, is not authorized by statute, nor is his compensation prescribed by any appropriation act; and the argument is, that inasmuch as neither his employment nor his compensation is directly known to any act of Congress, he cannot be regarded as an employé in the civil service of the United States; but the court is entirely of a different opinion, as the office of warden is an office created by law, and the appointee of the office is required to report to the Secretary of the Interior.

"Guards at the jail are selected by the warden, but their compensation is fixed by the Secretary of the Interior, and

they are paid by him, and it makes no difference whether the pay is charged to the appropriation for the department or the judiciary fund, as the fact remains that the whole subject is under the supervision of the head of that department, whether their pay is charged to the one fund or to the other the charge for their services must be approved by the warden and must be included in his report to the Secretary of the Interior, where the same is subject to further revision. Evidently they are employés in a bureau or division of the Interior Department, as their compensation is fixed by the head of that department, and the officer by whom they are employed is required annually to make a detailed report to that department of all his official acts.

"Persons employed in a bureau or division of a department are as much employés in the department, within the meaning of the joint resolution, as the messengers and others rendering service under the immediate supervision of the Secretary, or those specially named in the provision as entitled to its benefits. Unquestionably guards of the jail are employés of the warden, and the office of the warden of the jail is a bureau or division of the Department of the Interior.

"Viewed in that light, as the case must be, it is clear that the claim is well founded, and we are all of the opinion that the judgment should be affirmed."

Mutatis mutandis the argument exactly covers the cases at bar, for it is equally true that the clerk of the court and the marshal are officers created by law; they are required to report to the Secretary of the Interior, and the pay of their appointees, except so far as it is fixed by law, is subject to revision by the Secretary. It is difficult to distinguish between the employés of the warden, who have charge of prisoners and convicts in the jail, and the employés of the marshal, who have them in charge in the court-house. None of them can be said in any sense to be *judicial* officers, and the fact that they are connected with the judicial department of the Government as its ministerial officers, certainly does not take them out of the reason and equity of the rule adopted in the joint resolution.

The object of that resolution was to increase the pay of the employés in the civil service of the Government within the District of Columbia to enable them to meet the increased expenses thrown upon them by the then existing condition of things here. Are not these claimants in the civil service? Are they not in as great need of this bounty of Congress as any of the other employés of the Government? Is there anything in the fact that they are connected with our courts in the administration of the laws of the land that should disqualify them from receiving the benefits of this law?

A. G. RIDDLE,
FRANCIS MILLER,
Solicitors for Claimants.

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 161.—UNITED STATES, Appellant, *vs.* RETURN J. MEIGS, Jr.

No. 162.—UNITED STATES, Appellant, *vs.* ZACHARY TAYLOR.

No. 163.—UNITED STATES, Appellant, *vs.* HILLARY GRIMES.

No. 164.—UNITED STATES, Appellant, *vs.* WILLIAM A. MULLOY.

APPEALS FROM THE COURT OF CLAIMS.

Reply of the Appellees to the second point on the Brief of the Assistant Attorney General.

The matter brought forward by the Assistant Attorney General, under his second head, seems to require some consideration at our hands.

If his position is correct, this Court has no jurisdiction of the cases, and the appeals must be dismissed, which will affirm the judgments below. He, however, seems to assume that the jurisdiction exists to reverse, but not to affirm, the judgments—a proposition the logic of which we fail to appreciate.

The records show judgments against the United States, from which appeals are taken. These judgments were rendered May 17th, 1875, and the Attorney General allows them to remain on the calendar for nearly three years, with a full knowledge of all the facts, without any motion to

dismiss; and, when reached in their regular order, asks that this Court should retain the cases only to reverse the judgments, for the purpose, as it would seem, of rebuking the Court of Claims for an alleged attempt thrust upon it the decision of questions not legitimately coming before it.

Whatever action this Court may take in the premises must be *suâ sponte*. The United States have acquiesced in the action of the Court of Claims in giving these judgment in the manner they did, and cannot now be heard to question it. The language of the Court shows this acquiescence, and though the consent of the Attorney General cannot give jurisdiction, it will estop *him* from raising this objection here.

I. The record discloses no foundation for the position of the Attorney General. The opinion of the Court is no part of the record, and cannot be referred to for any purpose.

Phillips' Practice, 132.
Lessee of Fisher *vs.* Cockerell, 5 Pet., 248.
Williams *vs.* Morris, 12 Wheat., 117.

In this last case, Chief Justice Marshall fully discusses the subject of what constitutes "the record," by which alone this Court can be guided.

II. The question raised here was not made in the court below, where it might have been, by a motion for a new trial, if necessary. (Sec. 1088, R. S. U. S.)

2 Abbott's Practice, 229.

III. This Court has never squarely refused to review a case on certificate of division of opinion of circuit and district judges, *pro formâ*. In the cases cited on p. 16 of the brief of the Attorney General, there is an inclination that way, but the Court has never directly so decided. While discouraging the practice, it has entertained several such cases, as appears by those thus referred to.

Our cases are several selected as representative test cases, after consultation between the counsel for the claimants and the United States, and with the knowledge of the court below. They are cases of real merit, and are before this Court on their merits, brought here by the United States, in pursuance of the statutes governing the practice in the Court of Claims.

If the Court looks outside of these records, as asked by the brief of the appellants, it may perhaps see good reason for making a rule prohibiting *pro formâ* judgments in the Court of Claims, but we submit that until such rule is promulgated all cases brought to this Court, by due course of law, and within its jurisdiction, must be decided on their merits. We have here a judgment of the Court of Claims, and an appeal by the United States, brought regularly before this Court by a transcript of the record, and in these we have every element that gives it jurisdiction.

There may be some disadvantages arising from such action as the Court of Claims has taken in this case, but we apprehend the Supreme Court will be very slow to adopt a rule that will deprive that Court of all opportunity of having the advantage of the decision of the highest tribunal of the nation upon questions that may involve the rights of hundreds or thousands of our citizens. Is not the propriety of such action eminently a question for the discretion of the Court of Claims; and has it not shown that the able, learned and faithful judges who make up the *personnel* of that Court are quite equal to the exercise of a proper discretion in this matter?

A. G. RIDDLE,
FRANCIS MILLER,
Solicitors for Claimants.